Philadelphia Electric Company *and* Harold Glass *and* Edward John Kelly. Cases 4–CA–11253 and 4–CA–12547

10 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 5 November 1982 Administrative Law Judge Bruce C. Nasdor issued the attached decision.[1] The General Counsel and Charging Party Harold Glass filed exceptions and supporting briefs, and Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The judge issued an errata to his decision on 12 November and 9 December 1982.

[2] Charging Party Harold Glass has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] No exceptions have been filed with respect to the judge's dismissal of the allegation that Respondent violated Sec. 8(a)(3) of the Act.

[4] The judge inadvertently neglected to make a specific finding concerning the labor organization status of the Black Grievance Committee. We correct the judge's inadvertent omission based on the record evidence and on Respondent's concession, and conclude that the Black Grievance Committee has been, at all times material herein, a labor organization within the meaning of Sec. 2(5) of the Act.

We agree with the judge that Respondent did not, prima facie, interfere with the Sec. 7 rights of its employees by not according the Black Grievance Committee concurrent status with the Independent Group Assoiciation. We therefore find it unnecessary to pass upon the business justifications proffered by Respondent as a defense to its position.

In concluding that Respondent did not violate Sec. 8(a)(1) of the Act as alleged, Chairman Dotson and Member Dennis find it unnecessary to rely on the judge's citation of *Bruckner Nursing Home*, 262 NLRB 955 (1982), and *RCA Del Caribe*, 262 NLRB 963 (1982).

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard at Philadelphia, Pennsylvania, on March 8–11 and April 19–22, 1982. An order consolidating cases, consolidated amended complaint, and notice of hearing issued on December 31, 1982, alleging that Philadelphia Electric Company (PECO or Respondent), since the fall of 1978 to the present, met with the Independent Group Association (IGA) to discuss wages, hours, working conditions, and grievances. It is further alleged that, during the same period of time, Respondent has refused to meet with the Black Grievance Committee[1] (BGC) to discuss these same topics, thereby engaging in disparate treatment in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The General Counsel requests as a remedy that Respondent be required to grant recognition to the BGC to the same extent that it grants recognition to the IGA.

It is also alleged that Respondent suspended and subsequently discharged Edward John Kelly because he supported and assisted the BGC and provided assistance to the Philadelphia Commission on Human Relations (PCHR), in violation of Section 8(a)(1) and (3) of the Act.

Based on the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material herein, a public utility engaged in the generation, transmission, distribution, and sale of electricity, with a principal place of business located at 2301 Market Street, Philadelphia, Pennsylvania.

During the past year, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $250,000, and purchased and received goods valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania.

Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

IGA has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

PECO is a public utility with corporate offices located at 2301 Market Street, Philadelphia, Pennsylvania. It operates in the States of Pennsylvania and Maryland, serving approximately 3.7 million people, producing electricity, gas, and steam. PECO employs approximately 10,000 individuals. There are also contingent workers in the employ of a contractor, Henkels and McCoy, at PECO's Oregon shop. Tyrone Frazier, who will be discussed later, is one such individual. He considers himself to be in the employ of PECO.

[1] In its answer and at the hearing, Respondent denied that the Black Grievance Committee was a labor organization within the meaning of the Act. In its brief it now concedes that the Black Grievance Committee is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] The IGA did not file a brief in this matter.

A. *The Independent Group Association*

The IGA has between 4200 and 4600 members who are PECO employees. This does not include certain individuals at one location, the Chester generating station, who are represented by the International Brotherhood of Electrical Workers. The IGA has been in existence and has been dealing with PECO on issues concerning wages, hours, and working conditions for over 40 years. In July 1969 and in April 1977, the IGA made written requests to PECO for PECO to recognize the IGA as the exclusive representative of all PECO employees for purposes of collective bargaining. In September 1969 and May 1977, PECO declined the IGA's requests. Since May 1977, the IGA has not made any requests for recognition and it has never been certified by the National Labor Relations Board as the exclusive representative of the employees of Respondent. No labor organization is, or has been, the exclusive representative of all Respondent's employees within the meaning of Section 9(a) of the Act. The IGA files reports with the U.S. Department of Labor and the Internal Revenue Service.

Respondent's personnel and industrial relations department representatives conduct monthly meetings with the IGA. Eight of these meetings are with three IGA representatives and the remaining four meetings are with IGA's entire executive committee. There is an annual luncheon every December.

At these meetings, the IGA presents its views to Respondent's management regarding wages, hours, and working conditions. As a general practice, changes in these subjects are held for the August 1 general wage and benefit improvement package, which is implemented every year. IGA and Respondent follow a procedure whereby IGA presents to management requests for items to be included in the August 1 package, and other matters involving working conditions. Respondent's representatives discuss these items with the IGA at various meetings, including two which are held for the sole purpose of discussing the August 1 package. Essentially, IGA is merely contributing input because after the meetings Respondent unilaterally implements its policies, which apply to all employees regardless of their labor organization affiliation.

From the period September 1978 to the present, 25 areas have been discussed by Respondent with the IGA.

Respondent gives IGA the right to post minutes of meetings and notices of meetings on its bulletin boards.

IGA officials are permitted to use parking lots when conducting union business. These lots are normally reserved for Respondent's management personnel.

Respondent also makes reference to the IGA in its employee handbook, "You And Your Company," as the group with which it meets to deal with matters involving wages, hours, and working conditions.

At IGA's request, beginning January 12, 1981, Respondent agreed to dues deductions for IGA members who submit written checkoff authorizations to Respondent.

BGC has never requested a dues-checkoff procedure from Respondent.

Charles Fritz, Respondent's vice president of personnel and industrial relations and chief executive officer responsible for personnel matters, testified without contradiction that the BGC has never requested Respondent to meet for the purpose of discussing wages or benefits. Moreover, his unrefuted testimony is that Harold Glass,[3] a BGC representative, advised him that the BGC was not interested in working with Respondent in the area of wages and benefits.

There is no evidence that BGC has ever requested mention in the employee handbook or checkoff.

B. *Respondent's Grievance Procedure*

The testimony adduced at the hearing concentrated primarily on the disparate manner which Respondent treats the IGA and the BGC with reference to the processing of grievances. All employees process their grievances through their immediate supervisors and then through higher levels of supervision within their own department. Any employee presenting a grievance may be accompanied by another employee of the Company to represent him during this phase of the grievance procedure. It is uncontradicted that Respondent has permitted members of the BGC, including Harold Glass, to regularly represent employees in the processing of grievances.

After the grievance goes through the immediate supervisor, an employee may elect to have his grievance presented to the personnel and industrial relations department in two separate ways. Employees represented by the IGA may choose to have their grievance presented in writing by IGA representatives at the periodic meetings referred to earlier. When the grievance is presented to Fritz, the employee is not necessarily present. After a written and oral presentation at the meeting, the grievance is investigated and Fritz issues a written answer. In the event that his answer is negative, there is a fourth-step appeal. A meeting is held between the employee, the IGA representative, supervisors from the employees' department, and John J. McGinley, Respondent's manager of personnel and industrial relations, who is responsible to and reports to Fritz. McGinley mediates the dispute, paying particular attention to anything which may have been overlooked at the third step. He recommends a disposition to Fritz, and Fritz then issues an answer if he has changed his initial decision. Since September 1, 1978, IGA has presented approximately 242 grievances at the third step and in excess of 30 grievances at the fourth and final step.

Employees who are not members of the IGA and employee-members who do not wish to follow the IGA procedure follow a different route after exhausting their departmental remedies. They meet directly with various representatives of the personnel and industrial relations department, including Fritz. They may be represented by another employee of their choice, and record testimony reflects that members of the BGC, including Harold Glass, have represented employees in grievance meetings with various personnel department representatives, including Fritz. As a general rule Respondent does not re-

[3] Glass, the Charging Party, has been treasurer and a member of the executive committee for 10 years.

spond to individual grievances in writing, as the aggrieved employee is permitted to present his grievance personally to Fritz and receive an answer orally following investigation of the grievance.

There is a third variation of grievances not alluded to in PECO's handbook. When a group of employees with a common grievance do not elect to utilize the IGA, Respondent will meet with the men en masse or with representatives of the group for the purpose of resolving the grievance.

In an individual grievance when Harold Glass represents an employee, he may or may not hold himself out as a BGC representative. In either event, Respondent regards him as merely one employee representing another. It refuses to accord Glass BGC status during a grievance meeting. Furthermore, Respondent has refused to employ a process whereby the BGC can attend group meetings with the personnel department to present individual grievances in the same manner and by the same mode as the IGA. These are the practices which are alleged as violations of Section 8(a)(1) of the Act.

Fritz testified that he has told the BGC beginning in 1970 or 1971 that management did not believe it was proper to break the Company up into ethnic groups. He did not think it would be a wise thing to break the Company up into a Black group and then a group that might essentially become a white group. The employee complement would then begin to further polarize into other ethnic backgrounds. Moreover, according to his testimony, he meets on a periodic basis with a group of Catholic employees, and he would not want to see them set up a grievance procedure based on their Catholic backgrounds. He testified that creating splinter groups would be impractical both from a time and an economic standpoint.

On September 12, 1978, representatives of the personnel department and the BGC met to discuss individual grievances. Minutes of this meeting have been received in evidence as General Counsel's Exhibit 3. In that meeting Fritz again advised representatives of the BGC that PECO does not recognize it as appropriate to deal with in resolving individual grievances. He told BGC representatives that in the past he had told other groups of employees such as the foremen's association and the linemen's association that he believed it was not in the best interest of the employees to divide the Company along racial lines. Arnold Hall, a BGC representative, informed Fritz that he should meet with them as grievance representatives, but Fritz continued to maintain that he thought it was improper to split the Company along black and white lines. Again on September 26 and October 19, 1978, Fritz refused to process individual grievances at meetings with the BGC. At the meeting held on October 19, 1978, Fritz reiterated his reasons (he felt) "that it was wrong and divisive to have black employees process grievances through one group and white employees process grievances through another group, and repeated the fact that he could not formally process grievances through more than one group. He stated he was not closing the door on any future meetings with the BGC, and Mr. Hall indicated that they were not saying that they would not work through the IGA."[4] In its current posture, since September 1978, BGC representatives such as Glass are permitted to represent and participate in grievance meetings as concerned employees. When a BGC representative attends such a meeting, he or she is told that Respondent refuses to acknowledge the individual as a BGC representative or as appearing on behalf of any group or organization. Therefore, Glass has not been able to bring anyone else with him from the BGC to handle grievances because Respondent would be then viewing the BGC as representing the aggrieved employee. Glass is cognizant of the fact that Fritz is aware that he is a BGC representative, and therefore he does not in each and every instance request that he be considered a BGC representative. Fritz does not articulate that he is not recognizing Glass as such at each and every meeting.

It is conceded that Fritz will meet with the BGC about any matter except individual grievances.

C. *The Black Grievance Committee*

The BGC was formed in 1968 by several employees because the IGA seemed unresponsive to alleged discriminatory practices on the part of Respondent.

The BGC is composed of Respondent's employees, former employees, and their families. Harold Glass testified that its purposes are, inter alia, to assist employees in transfers and consideration of such matters as upward mobility for minorities and job testing.

Wendell Storey, BGC chairman, testified that the BGC does not file reports with the U.S. Department of Labor, Internal Revenue Service, or any other government agency. According to its constitution, which was not adopted until 1972, the BGC is governed by a main committee elected every 2 years by the general body. Voluminous record testimony reflects that the BGC does not follow this prescription. Rather, members on the main committee are selected by other members of the main committee, and the general membership has not voted on a main committee position since 1968. Moreover, the testimony is conflicting as to whether members of the main committee reelect themselves and whether this is done sporadically or with any regularity.

According to the constitution, all dues collected by the BGC "shall be utilized for legal services, operating expenses and educational benefits for minority employees of the Philadelphia Electric Company." Harold Glass, the Charging Party, testified that in actuality the BGC's dues are used to pay lawyers.

Based on Glass' testimony, dues are collected sporadically rather than on an annual basis. Moreover, there has been no election of union officers since the BGC came into existence.

From its beginning in 1968 until 1980, the BGC was constituted of and for minority employees, and its purpose was to resolve problems of minority employees only. Glass testified that, as he understood it, minorities included all persons except white males. Specifically, minorities, according to Glass' testimony, means white fe-

[4] This quote appears in the stipulation received in evidence as Jt. Exh. 1, par. 6(d). The IGA did not join in this stipulation.

males, Hispanics, male and female, and blacks, male and female.

The executive committee, which handles grievances, is an all-black committee.

In January 1980, Edward Kelly, the Charging Party in Case 4–CA–12547, became a member of the Black Grievance Committee. Thereafter, BGC's policy changed, when, in the spring of 1980, Harold Glass commenced to process Kelly's grievance. Kelly is a white male. This was the first time a grievance was processed on behalf of a white employee. Glass was unable to testify whether or not any white employees had been admitted to membership to the BGC prior to January 1980.

At the present time the BGC does not restrict admission to black members. Moreover, based on the testimony of two white males, the BGC has admitted them to membership and assisted them with problems.

Glass testified that at the present time there are between two and three hundred individuals who are members of the BGC. The record does not reflect how many of these members are current employees, former employees, or family members. Nor does the record reflect how many of the members work for other contractors.

D. *The Discharge of Edward John Kelly*

Kelly, the Charging Party, had been employed by Respondent from 1963 to October 1981, when he was terminated. For the last several years prior to his discharge, he was employed as an electrician in the bushing repair shop within the electrical maintenance division. Kelly joined the IGA in 1964 and remained a member until his discharge. In 1973, he became a shop steward at the Oregon shop and remained so until his discharge. He became disenchanted with the IGA and in January 1980 he joined the BGC.

Kelly testified that on the morning of April 10, 1978, he and a coworker, John Hornung, engaged in a physical altercation prior to the commencement of the shift and off of company property.

According to Kelly, Hornung made an ethnic slur to him: "He offered me outside. I thought it would be just a verbal match. We went out about a block and a half from the company." Kelly's testimony and written memorandum (G.C. Exh. 6) of the incident reflect that "I found myself following him [Hornung] out of the gate and west on Oregon Avenue. . . . I looked for a safe place to lay my glasses." When Kelly turned his back, Hornung hit him on the back of the head with a piece of lumber, perhaps a two-by-four or a four-by-four. As a result of the injury, Kelly left work and did not return until August 1978. Kelly prevailed in criminal and civil actions, but if he is to be believed Hornung continued to agitate him.

On August 29 and 30, 1978, Kelly embarked on a mission, a veritable crusade, to have the chronology of what will be characterized throughout this decision as "the Hornung incident"[5] placed in his personnel file. He bypassed his immediate supervisors, Crouthamel, a subforeman, and Raudenbash, the foreman, complaining to Onley, supervisor of electrical maintenance, that Hornung was harassing him by parading around carrying mock weapons. In response to this complaint, management, including Onley and his supervisor, Whitfield, general superintendent of maintenance, met with Kelly and Hornung on September 1, 1978. At this meeting, although management was not convinced that Hornung was harassing Kelly, they instructed him to avoid Kelly.

Thereafter, similar complaints by Kelly to management ensued. On September 20, 1978, Kelly complained to Onley that Hornung would walk past his work area carrying an axe. Onley investigated and found that Hornung, a carpenter, was directed by his supervisor to procure the axe. Kelly also complained about the way Hornung looked at him. Onley investigated each of Kelly's allegations regarding Hornung. He concluded that they were unfounded.

In October 1978, Kelly went to see Whitfield, complaining again about harassment, and requesting a written statement be made part of his personnel file. Whitfield refused to document the alleged friction between Kelly and Hornung. Shortly thereafter, Kelly was on disability from on or about October 18, 1978, to May 15, 1979 (approximately 30 weeks), as a result of an injury sustained in his back from falling off a chair.

In November 1978, while still on disability, Kelly met with O'Connell, president of the IGA, Downs, of Respondent's personnel department, and Dr. Hushion, director of Respondent's medical department. Kelly complained about harassment from Hornung and requested that it be documented in writing and put into his personnel file. According to Kelly, Downs responded there was nothing Respondent could do for him because it was not responsible for the fight with Hornung.

On May 23, 1979, when Kelly returned to work after his period of disability, he and his wife met with Dr. Hushion to discuss his return to work. Hushion suggested that Kelly might be able to arrange a transfer to a different department, but added that the transfer would cost him a 10-percent cut in pay. Under these circumstances Kelly was not interested in a transfer.

During the first week of June 1979, Hornung reported to management that Kelly spit on his shoes while in the storeroom area. Kelly was called to a meeting with Onley, where he was accused of this conduct. He became very upset, and on June 5 went on disability again for anxiety and depression. Kelly did not return to work until December 19, 1979, that is, 27 weeks and 1 day.

Kelly testified that President O'Connell of the IGA arranged a meeting with Whitfield, Kelly, Hushion, and Kelly's immediate supervisors in September 1979. He testified further that the meeting was held to minimize the contact between Hornung and himself. His memorandum (G.C. Exh. 6) reflects that the purpose of the meeting was "to try to resolve the matter so life could go on." Kelly testified that on October 4, 1979, he called Joseph Gallagher, manager of the electrical production department and Whitfield's supervisor, to discuss the conditions

[5] Since the incident occurred prior to the start of the shift and off of company property, neither employee was disciplined, although the incident was investigated. Both employees were interviewed and their statements placed in their personnel files.

under which Kelly could return to work without anxiety. At the meeting Kelly requested of Gallagher that Kembring, a coworker, be allowed to work with Kelly exclusively in order to teach Kelly the job. Kelly again requested that the Hornung incident and later incidents be included in his personnel file and contended that the problems were Hornung's fault. He requested also that he be moved into the bushing shop. Gallagher agreed that he could place Kelly in the bushing shop, with the qualification that Kelly would have to work in other areas as well if maintenance management directed him to do so. Further, Respondent could not allow Kelly to work exclusively with Kembring, or agree to place a memorandum in Hornung's file. The meeting lasted approximately 2 hours and Gallagher memorialized it in a memorandum which was received into evidence as Respondent's Exhibit 10.

Gallagher testified that after this meeting he had a number of telephone conversations with Fritz about returning Kelly to work. Gallagher told Fritz he did not think Kelly was ready to come back to work and recommended that he not be returned. According to Gallagher's testimony Fritz was attempting to find a way to effect Kelly's return and make him a useful employee. Gallagher testified further that he thought Fritz was most reluctant to terminate Kelly at that time.

Whitfield testified that towards the end of 1979 it came to his attention that a poll was being run among the employees in the shop. For $1, an employee could pick a time which would be the closest to when Kelly returned to work off of sick leave benefits. An employee or employees had asked Whitfield if he wanted to "get in it for a buck." In the words of Whitfield, "[I]t was a big joke." Whitfield decided to conduct a survey[6] of Kelly's absences. He testified, "[S]o I ran a survey which indicated to me that Ed [Kelly] was taking off just about as much time as he was entitled to, and he was getting miraculously well when his benefits ran out. And, this made me feel that Ed was making a mockery of the Company benefits and taking advantage. I therefore recommended to Joe Gallagher that he not bring him back. He [Kelly] was out at the time, and I said 'don't bring him back.'" Whitfield testified further that this was not the only reason he made such a recommendation to Gallagher. Other factors were the problems Kelly was having with other people, the reports Whitfield was getting in his office about Kelly walking off the job, spending too much time on the telephone, low productivity, and all these things in combination with his absences.

Fritz testified that during the same period of time:

> Dr. Hushion called me and stated that there was a man by the name of Kelly in the maintenance division who had been off sick for some period of time, and that Dr. Hushion felt that there was a chance that this person could be turned around and be made a productive employee.

Subsequent to these recommendations, Fritz and Hushion met with Kelly and his wife in December 1979. Fritz advised Kelly of his poor absenteeism record and that Respondent could not continue for an indefinite period of time with an employee with such a poor service record. After this meeting, Fritz determined to give Kelly another chance, and did not terminate him.

On December 6, 1979, Fritz called for a meeting between Kelly and himself. Fritz, according to Kelly's own testimony, wanted to talk with him about the conditions under which Kelly felt he might be able to go back to work comfortably at the Oregon shop. At this meeting, Fritz agreed to let Kelly work exclusively in the bushing area.

Based on Kelly's testimony, shortly after his meeting with Fritz, he was authorized to return to work. Instead, he decided to take a 2-week vacation, and did not return until January 7, 1980.

In January 1980, he joined the BGC to pursue his mission to memorialize his Hornung snydrome in writing to be placed in his personnel file.

About the time Kelly returned to work in January 1980, Crouthamel began to document[7] his work habits and performance. Crouthamel testified that the documentation reflected Kelly's lateness and absenteeism record, early quits, and general work performance. According to Crouthamel's uncontradicted testimony, higher management advised him that his problems with Kelly would have to be documented to be given any credence.

On February 20, 1980, Kelly called Harold Glass and told him that he desired to document Hornung's behavior in his, Kelly's, personnel file. Glass advised him to draft a chronology, which he did on February 24, 1980. On March 6, 1980, Kelly called Fritz with his request. Fritz told Kelly to make his request to Whitfield first, i.e., go through the chain of supervision. Whitfield was unavailable, so Kelly contacted Whitfield's superior, Gallagher, who again refused to place the document in Kelly's personnel file. Undaunted, Kelly called Fritz again, refusing to follow channels to Whitfield. Fritz, after some conversation, became angry, lost his temper, and hung up. Then, on the same day, Kelly called Respondent's president, J. Lee Everett. Everett told Kelly to go through Whitfield and then assured him he would be allowed to see Fritz.

Finally on March 12, 1980, Kelly met with Whitfield. He was accompanied by Glass, whom, according to his testimony, he introduced as a representative of the BGC.[8]

Whitfield testified that during the course of his meeting with Kelly and Glass it became obvious to him that Kelly was so concerned about documenting the Hornung incident in his personnel file that he, Whitfield, thought it was a situation the medical department should be involved in. Whitfield interpreted Kelly's behavior, in his words, "obsession," as not being normal and not within the sphere of his experience. Therefore, he believed he needed help from the medical department. He again refused to put Kelly's document into his personnel file and sent him to Dr. Hushion.

Prior to Kelly's appointment with Hushion, Hushion called Mrs. Kelly to discuss his problems in the Oregon

[6] Received in evidence as R. Exh. 7.

[7] In evidence as R. Exhs. 8 and 9.

[8] Glass and Whitfield testified that the BGC was not mentioned.

shop, particularly his "obsession" which had been continuing for nearly 2 years. According to Hushion, he told Mrs. Kelly he was concerned that if her husband persisted in his demands the department might take some disciplinary action against him or Respondent might be forced to put him on a medical disability, if the medical department determined that his conduct and absenteeism were due to anxiety and depression. When Kelly and Glass met with the doctor, Hushion related to them his conversation with Mrs. Kelly. After being informed that Hushion had called his wife, Kelly flew into a rage and stated, "I'm liable to go home and find my wife's head in the oven." Hushion assured Kelly that the conversation with his wife was calm and benign. He then called Mrs. Kelly back, in Kelly's presence, to explain why he had called her initially. There is a conflict in the testimony as to whether Hushion told Mrs. Kelly that her husband might be fired. Although in the final analysis I do not consider it critical, I will resolve the conflict later in my conclusions.

Subsequent to the meeting with Whitfield and Hushion, Kelly telephoned Fritz for another meeting. Kelly and Glass met with Fritz and Dr. Cincotta on March 19, 1980. During this meeting Fritz agreed to place the memorandum in Kelly's personnel file. Fritz also agreed to Kelly's request that he be allowed to work in the bushing department, apparently for the second time, although Glass does not remember this.

Kelly continued to visit Dr. Cincotta about his problems. Cincotta had been instructed by Hushion to see Kelly when he visited the medical department, which normally would be when he was out on disability. Kelly saw Cincotta twice within 10 days after the meeting in Fritz' office. During these visits on March 24 and 27, 1980, Kelly continued to complain about the "conspiracy" against him and harassment from his supervisors. Kelly was accompanied by Glass on the March 27 visit.

In July 1980 while visiting Washington, D.C., Kelly fell down the Capitol steps and injured his neck. He began treatment with Dr. Nahas, an osteopath. Nahas testified he saw Kelly about five times during this period. On August 15, 1980, Kelly visited Dr. Cincotta. Hushion testified that, when an employee is absent for any period of time, he is required to visit the medical deaprtment periodically in order to confirm that he is legitimately disabled. Kelly was out with his neck injury from July 23 to December 15, 1980. Cincotta testified that Kelly overreacted in his responses during the examination, making it difficult for Cincotta to examine him. Cincotta testified that he felt it was inappropriate for the type of examination he was giving Kelly. Cincotta also testified that Kelly had been out approximately 4 weeks with a neck injury, and that he presented a note from his physician indicating he would be out an additional month. Cincotta stated that he suggested to Kelly he felt that was an inordinate amount of time to be off with this type of a problem. Cincotta explained to Kelly that the medical department was reviewing cases of employees who had exhibited absenteeism problems due to medical reasons. He explained that due to the so-called guidelines for employees, a closer look would be taken at his type of absenteeism record. Moreover, hopefully these employees would show some improvement when their records were reviewed. Cincotta explained further to Kelly that the medical department intended to review each case individually and that, if the employees did not show significant improvement, they might be subject to disciplinary action.

Cincotta called Nahas[9] after Kelly left his office. Cincotta's testimony and notes (in evidence as R. Exh. 12) reveal that Nahas felt that to a degree Kelly was malingering, and he needed psychiatric counseling.

Nahas testified that, although he was unable to remember much of the telephone conversation, he remembered Cincotta saying that Kelly was a troublemaker going to the Black Grievance Committee. Kelly requested Nahas to prepare a "to whom it may concern" document which is dated September 29, 1980,[10] and is in evidence as Respondent's Exhibit 4. Nahas states in the document, "He [Ed] had tried to cause problems by bringing complaints to the Black Grievance Committee."

Cincotta's notes reflect that during one of the telephone calls he was advised by Nahas' secretary that Nahas suggested to Kelly that there was an emotional problem aggravating his condition and he should seek appropriate consultation.

In blaming management for his illness, Kelly testified that the fall down the Capitol steps "wasn't just a pull in the back, it was anxiety produced."

Kelly continued to see Cincotta during the fall of 1980. He had a note from his personal physician releasing him for work. Cincotta felt that, because of Kelly's medication, a combination of pain reliever and muscle relaxer which can cause drowsiness and sedation, it would not be in the best interest of safety to allow Kelly to return to work. Cincotta advised him to take another week off. Kelly testified that he accused Cincotta, "[Y]ou are not trying to run me out of sick time, are you?"

Kelly testified that during January 1981 Supervisor Crouthamel had been paying unusually close attention to his work. Crouthamel testified that on February 19, 1980, he asked Kelly how the bushing was coming, which enraged Kelly to the point where he began berating Crouthamel and heaping abusive language on him. When Crouthamel attempted to calm him down by stating, "[W]hoa Ed calm down we're adults, we can talk like adults," Kelly responded, inter alia, "Ernie Crouthamel you are going to get shoved up your ass," and, "[Y]ou are a royal pain in my fucking ass."

Later that morning Kelly was instructed to meet with Onley and Crouthamel. He brought along as his representative Kembring of the IGA. Kelly refused to make any response to the allegations of the earlier incident and testified that during the meeting he became so sick that he threatened to throw up on the rug unless he was permitted to go to the medical department. Kelly was then released to go to the medical department to see Cincotta,

[9] Cincotta placed two calls on August 15, 1980. During one call he reached the secretary, as Nahas was out of the office.

[10] Nahas testified that he prepared the document within a week or two after the call from Cincotta. In reality the document was prepared 6 weeks after the call.

who suggested that he see his psychiatrist, Dr. Rushton. This little episode led to a 7-month disability for anxiety, which ended when Kelly reported for duty on September 22, 1981.

It came to the attention of Whitfield that Kelly had contacted the medical department for the purpose of returning to work. On September 10, 1981, Whitfield sent a memorandum[11] to Fritz recommending that Kelly be discharged for the following reasons: "(1) a totally unacceptable attendance, (2) Kelly, when he did report to work, insisted that he be worked only in one area of the shop, limiting his flexibility and making it difficult for supervision to plan assignments. This also causes employee morale problems, as other employees feel that he is given preferential treatment by allowing him to pick his jobs, (3) Kelly's problems getting along with other employees as well as first-level supervision. Kelly repeatedly accusing other employees as well as supervision of harassment, which on investigation the accusations were found to be groundless." The document concludes with Whitfield stating that during the past 5 years Kelly had given no indication of improvement in any of the above areas and recommending that his employment be terminated.

Kelly was suspended for an indefinite duration, during which time he and his wife met with Fritz and Hushion. During this time Fritz' office reviewed Kelly's case with Daltroff, the vice president of electrical production, and with the medical department. Kelly was finally terminated permanently on October 16, 1981.

E. *Kelly's Involvement with the Philadelphia Commission on Human Relations Complaints (PCHR)*

Tyrone Frazier, an employee of the independent contractor, Henkels and McCoy, filed a complaint against Respondent with the Equal Employment Opportunity Commission (EEOC) alleging that Crouthamel racially slurred him. Kelly allegedly overheard the remark. The complaint was deferred to PCHR for investigation. On September 19, 1980, Kelly spoke to a PCHR representative for the first time.

In June, Kelly was called to Whitfield's office. This meeting was for the purpose of investigating the alleged racial slur. Although there is no evidence that Kelly was the subject of any disciplinary action, or anything more than a possible witness to the remark, Kelly would not answer any questions without a representative being present.

On October 2, 1980, Kelly gave a deposition in a case the BGC had filed against Respondent. Therefore, according to the calendar, during Kelly's meetings with Whitfield, Fritz, and Hushion in March 1980, Kelly was not involved in any complaints against Respondent involving discrimination. Nor was he involved in such when he saw Cincotta in April and August 1980. After going on a 7-month disability for anxiety[12] in February 1981, Kelly filed his own charge with the PCHR charging his supervisor with harassment.

On September 24, 1981, Kelly filed another complaint with PCHR alleging discrimination by Respondent for suspending him. This complaint was filed after Whitfield's recommendation and after the machinery leading to the discharge was set in motion.

F. *The Implementation of Respondent's Absenteeism Policy and Disciplinary Guidelines—Disabilitant Payroll*

Respondent's policies are set forth in the employee handbook "You and Your Company" and a memo entitled "Absence—Lateness Control Guidelines." Respondent's policies were supplemented in 1980.[13]

Fritz testified in essence that the guidelines allow flexibility and are applied on a case-by-case basis. Moreover, the disciplinary guidelines are not applied to individuals with long-term or chronic problems, e.g., multiple sclerosis. Absentee control guidelines are not intended to apply to long-term disability employees. Other management officials corroborated Fritz.

The record reflects by way of testimony and documentation[14] that other employees with emotional, psychiatric, and alcohol-related problems received treatment analogous to Kelly's, i.e., lengthy tolerance of absences, finally culminating in discharge.

Absenteeism had reached problem proportions, so in 1980 Respondent researched and identified those employees with long-term absenteeism records. The names of 20 employees, including Kelly, were placed on a list and given to Fritz' department with a directive to monitor those employees. Fritz made the medical department responsible for meeting periodically with each employee. Hushion instructed Cincotta to monitor their attendance and warn them that continued absences could result in their discharge. Cincotta carried out this edict and warned Kelly two or three times. After a year, a summary and recommendation were sent to Fritz. Thus, these 20 employees were in effect removed from Respondent's progressive discipline policies and placed within the sphere of the medical department.

Respondent readily admits that Kelly was not warned by his immediate supervisors. Whitfield testified in answer to why he never warned Kelly in writing about his attendance:

> No Mr. Kelly's problem was extended illness, not normal one or two day outages like most attendance problems. Mr. Kelly's problem was a medical department problem. That's why Mr. Kelly did not get any reprimands or warnings through the normal disciplinary guidelines. His attendance was poor because he would take off extended periods of time, not single days which normally fall under the disciplinary guidelines.

Onley also testified that he did not warn Kelly because as far as he was concerned Kelly was absent because of

[11] A document, in evidence as R. Exh. 19, which was approved by Joseph Gallagher, manager of the electrical production department.

[12] The incident involving abusive language to Crouthamel.

[13] See G.C. Exhs. 25, 26, and 27.

[14] See G.C. Exh. 31.

medically related problems. The record does reflect that Kelly received a warning from Fritz during their meeting in December 1979 following the recommendation to terminate him by supervisors of his department.

Three out of the 20 employees were terminated for failure to report to the medical department as scheduled. Employees Spirito and Summeril were placed on the disabilitant payroll. Spirito met the *criteria* for the disabilitant payroll and was to be placed on it when his other benefits expired. Respondent became aware that Spirito, on the days when he was well enough, would work at his brother's business occasionally helping out with customers. Testimony by Hushion was that there was little chance that Spirito could ever return to work in Respondent's employ.

Several employees showed improvement and others were placed in a "wait and watch" category. Campbell was placed on "attendance restrictions." This required very close supervision, doctors' certificates, and ineligibility for promotions or merit increases.

Of the 12 individuals dismissed for absenteeism since March 1980, 5 were previously suspended. Others received no warnings, some received one warning, and some received as many as three warnings. There is no real pattern.

The disabilitant payroll is payroll coverage for employees who for medical reasons are permanently disabled. Benefits are received after the expiration of the employees' sick leave time and other benefits. An employee may be placed on the disabilitant payroll if he has 15 years of service and his personal physician in conjunction with the medical department determine that the employee is permanently unable to work for Respondent. The evidence reflects that Respondent considered Kelly for the disabilitant payroll before terminating him. Fritz requested an analysis of the benefits that would be available to Kelly and asked Hushion to discuss with Rushton, Kelly's psychiatrist, whether Kelly was able to work. Rushton confirmed what he had stated on the certificate when Kelly was released for work on September 23, 1982. Rushton concluded that Kelly was able to work. Accordingly, Kelly was not eligible for the disabilitant payroll in view of the fact that his own psychiatrist declared him fit for work.

G. *Conclusion and Analysis*

1. The 8(a)(1) allegation

Although the litigation was structured in terms of 8(a)(2) and (5) violations, Section 8(a)(1) of the Act is the only section alleged to have been violated.

Essentially, counsel for the General Counsel argues that the BGC should be accorded the same status and given the same advantages as the IGA.

Approximately 40 years ago, Respondent entered into a relationship, noncontractual, with the IGA. There are two features to this relationship. First, the IGA represents individual employees in presenting grievances to management. Second, before Respondent grants its annual wage and benefit package, it meets with IGA representatives to learn the desires of IGA members. Respondent then unilaterally implements its terms and policies. Thus, Respondent accords "members only" recognition to IGA, a status held to be perfectly valid and lawful. See *Retail Clerks Locals 128 and 633*, 369 U.S. 17 (1962).

The fact that Respondent has voluntarily granted certain privileges to IGA, in my opinion, does not place an obligation on Respondent to grant equal privileges to the BGC. Neither the IGA nor the BGC is an exclusive representative of Respondent's employees within the meaning of Section 9(a) of the Act. Neither organization had demonstrated majority status. It is likely that Respondent's treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC. It must also be recognized that Respondent has not interfered with the rights of any of its employees to join or support the BGC nor has it impeded the BGC in any of its activities, organizational or otherwise.

In my view, favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks 9(a) status.

Because this case presents somewhat of a novel issue, the parties have cited telephone directories of cases in their efforts to analogize. We probably all would agree that the Supreme Court in *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946), arrived at the conclusion that it is an unfair labor practice, a violation of Section 8(a)(5), for an employer to refuse to bargain only if the Union represents a majority of the employer's employees. The Board expresses itself clearly and succinctly in *Don Mendenhall, Inc.*, 194 NLRB 1109, 1110 (1972). In that case there was a members-only contract and the Board found that there was no violation of Section 8(a)(5). It concluded that:

> . . . the Respondent's actions cannot be held violative of Section 8(a)(5). That section, by reference to Section 9(a), requires as a predicate for any finding of a violation that the employee representative has been designated or selected as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms.

While these and other cases cited, involving Section 8(a)(2) of the Act, teach basics with reference to the Board's concept of minority representatives, they do not focus on the central issue involved herein. Are employees being deprived of Section 7 rights?

It seems to me that counsel for the General Counsel is attempting to utilize Section 7 as a vehicle for demanding bargaining rights which do not exist based on Board and court law. The record is manifestly clear that Respondent grants to all of its employees the right to a representative in a grievance situation.

These rights are derived from Sections 7 and 9(a) of the Act. Respondent herein has a very detailed grievance machinery which is available to all of its employees. This is not a situation like that presented in *United Aircraft Corp.*, 179 NLRB 935 (1969), where there was serious doubt of the union's continued majority status and an absence of evidence that the union enjoyed such status. In that case the employer refused to allow its employees to

be represented by lodge stewards. The Board concluded: 179 NLRB at 938:

> As the Respondent's obligation to honor employee requests for union stewards was dependent upon the majority status of the Union, and as the majority status of Lodge 1746 was not established during the relevant period, we find that the Respondent did not violate Section 8(a)(5) by denying such requests.

In my opinion Respondent has not frustrated the rights of its employees, including BGC members, to engage in protected concerted activity. It meets with groups of employees with common problems or grievances and interacts with their spokesman, thereby providing an access for airing either group or individual grievances. The same is equally applicable to those employees who desire to engage in union activity.

Recently, the Board reevaluated its formula for imposing strict employer neutrality[15] during the pendency of a question concerning representation (QCR). Although in the instant case there is no QCR, the case *Bruckner Nursing Home*, 262 NLRB 955 (1982), and the companion case *RCA Del Caribe*, 262 NLRB 963 (1982), probably illuminate the Board's current views in this area of the law. For my part, I ask myself, if the Board no longer requires neutrality on the facts and circumstances of those cases, how can favoritism or assistance[16] be a violation in this case? In my opinion it is not. Here, we have no incumbent union, no petition, no QCR, and no competition for exclusive representation. I do not believe that Respondent herein is responsible for organizing its employees, nor is it obligated to organize its employees whether they by IGA members, BGC members, or members of any other organization. Moreover, I conclude that, if it chooses to render aid to the IGA, it is not a violation of Section 8(a)(1) to refuse to render concomitant aid to the BGC.

The overwhelming weight of probative evidence reflects that Respondent is not discriminating against its employees. By placing the name of IGA in its handbook and setting up IGA grievance procedures, it may be minimally encouraging membership in the IGA and discouraging membership in the BGC. In my view, these factors, absent discrimination, are not violations of Section 8(a)(1) of the Act, and in no manner restrain or restrict employees from joining, forming, or assisting a labor organziation or organizations with a view towards obtaining Section 9(a) status. While Charging Party Glass may complain that he does not have the same leverage as a BGC member that he would possess as an IGA member, he has the right to engage in union or concerted activities to improve his plight and the plight of his organization, including the right to seek exclusive recognition. When all of the facts in this case are marshalled, I reach the legal conclusion that Respondent is not intefering with or abridging protected employee rights.

Respondent avers that it has legitimate business justifications for not giving the BGC the same benefits and privileges as it gives the IGA. In this regard it does not want to polarize its employees into racially segregated groups, thereby dealing with racially segregated labor organizations. It argues that it would be leaving itself vulnerable to title VII violations by fragmenting its employees into splinter groups based on race.[17]

Respondent accords status to the IGA. It advances that this is justified by the IGA's large membership, stability, and many years of existence. Conversely, it contends that the size of the BGC alone provides justification for refusing to accord it the same status. Respondent also maintains that the name of the BGC, in and of itself, gives the Respondent cause for concern that its formal recognition would lead to racial polarization.

The BGC's primary focus of consideration is the elimination of employment discrimination. Based on Fritz' uncontroverted testimony, in certain matters[18] the BGC has not even requested equal status or shown even a glimmer of interest for equal privileges. The undisputed evidence is that Respondent meets with the BGC on request, and discusses wages, hours, and working conditions. There is no evidence that Respondent has refused to meet with the BGC as a group or that it has refused to accept input from the BGC on matters involving wages, hours, or working conditions.

It is not within my province to speculate as to Respondent's wisdom, or to substitute my judgment for Respondent's judgment in arriving at its business decisions. I do conclude on the basis of this entire record and the above-cited facts that Respondent has legitimate business reasons for refusing to accord the BGC concurrent status with the IGA, and that by doing so employees are not being denied their Section 7 rights. Accordingly, I will recommend that the allegation that Respondent has violated Section 8(a)(1) of the Act be dismissed. With respect to Respondent's defense that it refuses to accord status to BGC based on its admission of supervisors to membership, I find this to be without merit. The Board has long held that supervisory membership in a labor organization is not a basis for refusing to bargain with such a labor organization. In certain industries, for example, the newspaper industry, it is common for supervisory personnel to be members of labor organizations although they are precluded by law from directing the affairs of or holding office in said labor organizations.

Addressing myself to Respondent's 10(b) defense, I find this to be without merit. Marie Wilson testified that on April 24, 1980, a petition was given to a supervisor authorizing the BGC to bring a grievance to management's attention. She testified that no response was given to the petition by Respondent. In my opinion that incident constitutes a revival of BGC's request to represent

[15] Which has come to be known as the *Midwest Piping* doctrine, *Midwest Piping Co.*, 63 NLRB 1060 (1945).

[16] Not in the context of Sec. 8(a)(2).

[17] I recognize that the BGC, at the present time, does process grievances of nonminorities.

[18] For example: checkoff, parking spaces, and mention by name in the employee handbook. There was testimony by Gail Jones that a low-ranking supervisor was requested to provide bulletin board space and refused. The record is silent as to whether this supervisor had the authority to grant or refuse the space. At any rate this was not communicated to Fritz.

employees and a further revival of the refusal to do so by Respondent. Furthermore, there is undisputed testimony by Edward Kelly that on March 19, 1980, at a meeting with Fritz he introduced Glass as his BGC representative and Fritz responded that they could not proceed with the meeting with Harold Glass present as a BGC representative. The meeting could only continue if Glass acted as an employee representating another employee. Therefore, there is another incident where there was a request and a refusal within the 10(b) period.

2. The discharge of Edward Kelly

Throughout 8 days of the hearing, I observed Kelly on the witness stand and seated in the hearing room appearing to be taking copious notes. I am prompted at the outset to make some observations. Kelly impressed me as being so totally enveloped in paranoia, so obsessed with the impression that there was a conspiracy[19] by coworkers and management to get or harass him, that he has rendered himself wholly nonfunctional as a productive employee. Perusal of the documentary evidence and a reading of the transcript patently reveal an individual so 100 percent caught up in compulsive behavior that he could not have had time to perform the requisite job duties. As a witness he had a tendency to distort and falsely color. Furthermore, he had no regard for the truth. Where there exist conflicts in the testimony, I resolve same in favor of Respondent's witnesses and against Kelly. One can only wonder why the city of Philadelphia has not been blacked out for the last 4 years.

By way of contrast, Respondent's management and medical personnel did everything humanly possible to alleviate Kelly's imagined and real discomforts, in an effort to rehabilitate him, including tolerating his excessive absenteeism for an inordinately long period of time. In my experience, I cannot recollect ever seeing an employer exhibit the degree of patience with an employee as this Respondent exhibited with Kelly.

The record is devoid of any direct evidence of animus. The only suggestion of animus[20] is Cincotta's alleged reference to Kelly and the BGC to Nahas on August 15, 1980, during a telephone conversation. Cincotta was exacting and unerring in his testimony. By way of contrast, Nahas was indefinite, evasive, and nebulous. When I propounded several questions to Nahas, he stated that he could not remember whether or not Cincotta used the words "troublemaker." He also admitted that he was drawing inferences rather than quoting the remark in issue. I conclude that the testimony of Nahas was unreliable and I specifically discredit him. I credit the testimony of Cincotta in every regard.

In 1978 Kelly completed his 15th year in the employ of Respondent. It was in that year that his paid sick leave benefits increased to 30 weeks. At the time of the Hornung fight he was receiving 20 weeks of paid sick leave. He stayed out as a result of that injury for 19 of the 20 weeks. From October 1978 until May 1979, he used 30 of 30 weeks when he was out because of falling from a chair. From June until December 1979 he was out for 27 weeks and 1 day out of 30 weeks because of anxiety/depression after he had been accused of spitting on Hornung's shoes. From July to December 1980, Kelly was out 19 weeks and 3 days out of 30 weeks because of a neck injury and anxiety/depression. From January until September 1981, he was out 29 weeks and 2 days out of 30 weeks because of anxiety/depression after the cursing incident. It stretches the bounds of credulity to think that this pattern was legitimate. Even Kelly's coworkers became aware of his deception when they began a pool as to when Kelly would return to work. It is no wonder that Whitfield considered Kelly's use of sick leave as a "mockery" of Respondent's sick leave policy. His record serves as a justifiable and permissible basis for termination assuming, arguendo, legitimacy.

The record is replete with efforts on the part of management to improve Kelly's outlook and prevent his long-term absences. They coddled and indulged him. They made their medical department facilities and personnel available at his slightest whim. They warned and cajoled him, all to no avail. He received personalized, individual attention. A year before his discharge, he was placed on a list with 19 other employees with poor absenteeism records in an effort to rehabilitate him. This was but another act of futility. Respondent even involved his wife in an effort to improve his plight. They wanted to fire him in 1979, which preceded any of his protected activity, but upper management decided to work with him longer. Respondent even went so far as to try and arrange to place him on the disabilitant payroll, but his own psychiatrist found him able to work.

Although counsel for the General Counsel does not allege that Kelly was fired for IGA activities, Kelly's own perception may differ. When I asked him why he thought management had this attitude (lack of caring) towards him, he responded, "[T]owards me? Because I was very effective as an IGA representative. And at these meetings you do make enemies. Not wilfully, but you do."

Kelly's discharge occurred approximately a year after his involvement in the Frazier case, 8 months after he filed his own charge, and approximately 19 months after he went to Harold Glass and the BGC for assistance. During the period 1979 to 1981, his absenteeism, conduct, and attitude continued to deteriorate. In my opinion, Respondent does not have to live with Kelly's delicate psyche ad infinitum. Respondent no doubt was always waiting for the other shoe to drop. When would some trivial incident send Kelly back to the couch and remove him from production for another 29—but never 30—weeks?

I find that the absentee control guidelines were not applied disparately to Kelly. The credited testimony is that they were not meant to apply to special cases of employees with chronic medical problems. In the case of *Teledyne, Inc.*, 246 NLRB 766 (1979), an employee was fired after being given a warning, while others were given

[19] See, inter alia, G.C. Exh. 6, p. 4.

[20] Hushion's remarks to Mrs. Kelly, regardless of what version is accepted, do not rise to the level of animus. Based on Hushion's testimony and Mrs. Kelly's letter in evidence as G.C. Exh. 8, I credit Hushion and conclude that he told Mrs. Kelly that Kelly could be disciplined or placed on a medical disability.

written disciplinary notices or disciplined for the same reason. The employee had an obsessive insistence to be transferred to another department and made frequent complaints to all those who would listen. He made insertions in an operational logbook about his complaints and sent letters to management. His attitude towards his work was poor. Although his work evaluations were excellent they were inconsistent with his extremely poor attitude, his failure to observe work rules or safety measures, and his preoccupation with a transfer. He had a tendency to make mistakes resulting in a loss of production and possible damage to equipment. He was not as active as other employees in union and concerted activity. The record reflected that no employee had the same antagonism towards the respondent or this employee's poor attitude. The Board concluded that the employee was discharged for cause, and he was in that case referred to as a "special case." In my opinion this record amply demonstrates that Kelly was indeed a special case.

I find and conclude that Kelly's protected activity was not "a motivating factor"[21] in Respondent's decision to discharge him. There is, in my opinion, no nexus between his termination and his activities involving the BGC, the PCHR, or any other union or concerted activity he may have been involved in. The record establishes irrefutably that Respondent discharged Kelly for cause, and I so find. Accordingly, I will recommend that the 8(a)(3) allegations and the 8(a)(1) derivative allegation be dismissed.

[21] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The BGC is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.
3. The IGA is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.
4. The allegations in the consolidated amended complaint that Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act have not been supported by substantial evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following

ORDER[22]

It is recommended that the consolidated amended complaint herein be, and it hereby is, dismissed in its entirety.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.